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No. 162

In the Supreme Court of the United States

OCTOBER TERM, 1943

MRS. ZULA MAY WILSON, ADMINISTRATRIX OF THE ESTATE OF TYRE WALTON, DECEASED, PETITIONER

v.

SOUTHERN PACKAGE CORPORATION, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

INDEX

CITATIONS

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The Solicitor General submits this brief on behalf of the Administrator of the Wage and Hour Division, United States Department of Labor, as amicus curiae.

OPINION BELOW

The opinion of the Circuit Court for Claiborne County, Mississippi, awarding judgment in favor of petitioner, is unreported. The opinion of the Supreme Court of Mississippi, reversing the judgment of the trial court and rendering

final judgment for respondent, is reported in 11 So. (2d) 912. It also appears at page 5 of the printed record.

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered February 15, 1943. The petition for certiorari was granted by this Court on October 11, 1943 (R. 18). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The respondent is engaged in manufacturing veneer from logs. It is conceded that substantial quantities of its output are shipped in interstate commerce. The petitioner's decedent was employed as a night watchman at said plant. Was the employee engaged in a process or occupation necessary to the production of goods for commerce within the meaning of Section 3 (j) of the Fair Labor Standards Act of 1938?[1]

STATUTE INVOLVED

The pertinent provision of the Fair Labor Standards Act, c. 676, 52 Stat. 1060 (29 U. S. C.,

[1] Respondent has also raised questions as to the survivorship of the cause of action and the statute of limitations, but the court below found it unnecessary to pass upon these points. This brief amicus is concerned only with the question of coverage.

sec. 203.(j)), is Section 3 (j) which reads as follows:

> (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

STATEMENT

This suit was instituted by Fred Walton under Section 16 (b) of the Fair Labor Standards Act to recover unpaid overtime compensation allegedly required by Section 7. Upon the death of the plaintiff the action was revived in the name of his administratrix, petitioner herein.

According to the agreed statement of facts (R. 1), the respondent operates a plant at which it manufactures veneer from logs, and ships "a substantial part" of its products outside the State of Mississippi. During the period involved, the plant operated only during the day, and petitioner's decedent was employed as a night watchman (R. 1). He was required to make hourly rounds of the plant, punch a night watchman's clock at designated stations and to report any fires or trespassers (R. 2). A record or log of

the watchman's reports was preserved. The amount due for overtime, if liability exists, is stipulated between the parties (R. 3).

The trial court rendered judgment for the petitioner. The Supreme Court of Mississippi reversed and entered final judgment for respondent (R. 17).

ARGUMENT

PETITIONER'S DUTIES AS A WATCHMAN CONSTITUTED AN "OCCUPATION NECESSARY TO THE PRODUCTION" OF GOODS FOR COMMERCE WITHIN THE MEANING OF THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act applies to employees engaged in any "occupation necessary to the production" of goods for commerce. In *Kirschbaum* v. *Walling*, 316 U. S. 517, the Court held the work of watchmen to fall within this language.[2]

The decision of the court below is placed upon the supposed distinction that here a night watchman was involved and his duties were performed during hours when the plant was not in operation. But the *Kirschbaum* decision is not susceptible of such an interpretation. In that case this Court described the duties of the watchmen as protecting "the buildings from fire and theft." The employees performing such duties were among those

[2] In the *Kirschbaum* case, the watchman was the employee of the owner of the building, not of an employer producing for commerce. In the instant case, petitioner's employer itself manufactures and ships in interstate commerce.

held to be "engaged in an occupation 'necessary to the production of goods for commerce,'" and at least one of them was a night watchman (*Kirschbaum* Record, p. 63). Coverage was predicated upon the theory that "maintenance of a safe, habitable building is indispensable to" the production of goods for interstate commerce (316 U. S., at 524). The facts of the instant case fall squarely within this rationale. The watchman was employed "for the purpose of reporting any fires and trespassers" (R. 5). And even if his duties related only to the protection of the plant rather than the goods produced (R. 11), he was engaged in maintaining a building so that production could be carried on. The fact that this protection is afforded at night, when the need for it may be greater, is hardly a basis for denying coverage.

With the exception of the decision below, and possibly one district court decision,[3] none of the many lower court cases concerning watchmen, whether they preceded or followed the *Kirschbaum* case, have made any distinction between watching

[3] *Brown* v. *Carter Drilling Co.*, 38 F. Supp. 489 (S. D. Tex.), decided by Judge Kennerly, in which the point is not specifically made. This case was not appealed, but the Fifth Circuit subsequently reversed Judge Kennerly in *Walling* v. *Sondock*, 132 F. (2d) 77 (C. C. A. 5), certiorari denied, 318 U. S. 772, which involved watchmen with duties substantially the same as those of the watchmen in the case at bar. The New Mexico Supreme Court, in *Robertson* v. *Oil Well Drilling Co.*, 47 N. M. 1, 131 P. (2d) 978, has also noted that the *Brown* case is inconsistent with subsequent and controlling decisions.

duties performed while the plant was in actual production and the same duties performed during the night hours when the plant is closed.* In the one other case in which the point was noted, the distinction was rejected as of no consequence. *Robertson* v. *Oil Well Drilling Co.*, 47 N. M. 1, 131 P. (2d) 978, 980. The other cases have apparently assumed that it was immaterial when the watchman's duties were being performed. In some of the cases holding watchmen subject to the Act the facts show that the watchman was working while no production activities were in progress. *Johnson* v. *Phillips-Buttorff Mfg. Co.*, 160 S. W. (2d) 893 (Tenn. 1942), certiorari denied, 317 U. S. 648; *Walling* v. *Sondock*, 43 F. Supp. 339 (S. D. Tex.), reversed, 132 F. (2d) 77 (C. C. A. 5), certiorari denied, 318 U. S. 772; *Milam* v. *Texas Spring & Wheel Co.*, 157 S. W. (2d) 653 (Tex. Civ. App.); *Lefevers* v. *General Export Iron*

*The six watchman decisions relied upon by respondent (see brief in opposition to petition, p. 18) were all decided prior to this Court's decision in *Kirschbaum*. None of them explicitly made the distinction made by the court below. Three were decided on entirely different grounds not pertinent here. *Brown* v. *Bailey*, 177 Tenn. 185, 147 S. W. (2d) 105 (1941); *Dotson* v. *Stowers*, 37 F. Supp. 937 (S. D. W. Va.); *Bowman* v. *Pace Company*, 119 F. (2d) 858 (C. C. A. 5). *Rogers* v. *Glazer*, 32 F. Supp. 990 (W. D. Mo.), denied recovery to a night watchman on the theory that a watchman's duties were not necessary to production. *Hart* v. *Gregory*, 220 N. C. 180, 16 S. E. (2d) 837 (1941), held that a watchman must have some additional duties before being entitled to the benefits of the Act. *Brown* v. *Carter Drilling Co.* is discussed in the preceding footnote.

and Metal Co., 36 F. Supp. 838 (S. D. Tex.). In a number of other decisions it appears that the employee was a night watchman, who was probably working while the plant was not in operation.[5] One court has indicated that the need for the watchman's protection may be greater when no operations are going on.[6] Indeed, while the pro-

[5] Since, before the United States entered the war, most plants did not operate at night, night watchmen were presumably on duty when no production was going on. *Mid-Continent Pipe Line Co.* v. *Hargrave*, 129 F. (2d) 655 (C. C. A. 10) (watchman for pipe lines and oil refinery, presumably both night and day); *Shepler* v. *Crucible Fuel Co.*, 6 Wage Hour Rept. 185 (W. D. Pa. 1943), affirmed on other grounds, 6 Wage Hour Rept. 936 (C. C. A. 3, 1943); *Nochaus* v. *Joseph Greenspon's Son Pipe Corp.*, 164 S. W. (2d) 180 (Mo. App.); *Wood* v. *Central Sand & Gravel Co.*, 33 F. Supp. 40 (W. D. Tenn.); *Reliance Storage & Inspection Co.* v. *Hubbard*, 50 F. Supp. 1012 (W. D. Va.); *Dollar* v. *Caddo Lumber Co.*, 43 F. Supp. 822 (W. D. Ark.); *Reeves* v. *Howard County Refining Co.*, 33 F. Supp. 90 (N. D. Tex.); *Cushway* v. *Stork Engineering Co.*, 51 F. Supp. 568 (E. D. Mich.); *Acme Lumber Co.* v. *Shaw*, 243 Ala. 421, 10 So. (2d) 285 (1942). Cases in which it does not appear when the watchman worked, in which the court apparently did not regard it as of consequence, are *Craft* v. *Fish*, 5 Wage Hour Rept. 737 (Common Pleas, Scioto Co., Ohio); *Steger* v. *Beard & Stone Elec. Co.*, 4 Wage Hour Rept. 411 (N. D. Tex. (1941)); *Deutsch* v. *Heywood Wakefield Co.*, 6 Wage Hour Rept. 546 (S. D. N. Y. 1943).

[6] This seems to have been the thought of the court in *Robertson* v. *Oil Well Drilling Co.*, 47 N. M. 1, 131 P. (2d) 978, 980, which involved a watchman for a drilling rig which had been dismantled and stored awaiting removal to a new location. In holding the employee covered, the court stated: "To have left this machinery unguarded during waiting periods between jobs, and to have thereby suffered loss or

duction employees are present it may well be that they can sufficiently protect the employer's property against fire and intruders and that a watchman is unnecessary.

The assumption by the court below that the Act had not been held applicable to employees having no duties other than strictly watching is likewise without merit. The *Kirschbaum* case and other decisions cited make it clear that watching duties alone constitute an "occupation necessary to the production." While the additional duties which a watchman may perform may add to the value of his services, they are not essential to his coverage under the Act.[7]

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damage to the whole or some vital part, would surely, in some degree, have impeded, hindered, and perhaps destroyed that commerce'. (*Mid-Continent Pipe Line Co.* v. *Hargrave*, 129 F. (2d) 655 (C. C. A. 10))."

[7] See *Cushway* v. *Stork Engineering Co.*, 51 F. Supp. 568, 571 (E. D. Mich.), where the court said that watching duties alone are sufficient; the other duty "merely adds to the value of his services but does not control his status as an employee necessary to the production of goods for commerce."; *Acme Lumber Co.* v. *Shaw*, 243 Ala. 421, 10 So. (2d) 285 (1942), where the court said: One "performing the duties of a night watchman * * * is an employee within the protection of the [Act]. The additional or incidental services * * * need not be considered * * *." *Deutsch* v. *Heywood Wakefield Co.*, 6 Wage Hour Rept. 546 (S. D. N. Y. 1943), where the court said that there was no difference "between an engineer, elevator operator, and a watchman."

CONCLUSION

The judgment of the Supreme Court of Mississippi on this point is erroneous and should be reversed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

No. 159.—October Term, 1943.

Mrs. Eula May Walton, Administratrix of the Estate of Fred Walton, Deceased, Petitioner,
vs
Southern Package Corporation.

On Writ of Certiorari to the Supreme Court of Mississippi.

[January 3, 1944.]

Mr. Justice Black delivered the opinion of the Court.

This is a suit brought against the respondent by an employee, Fred Walton, in a Mississippi state court to recover overtime compensation and liquidated damages as authorized by Section 16(b) of the Fair Labor Standards Act of 1938.[1] Walton died before the case was tried and the suit was revived by his administratrix, the petitioner here. A judgment for the petitioner rendered by the trial court was reversed by the Mississippi Supreme Court[2] on the ground that Walton had not been employed in the production of goods for interstate commerce or in "any process or occupation necessary to the production thereof"[3] and therefore was not covered by the Act. We granted certiorari because this interpretation of the Act raised a federal question of importance and because of the claim by petitioner that the interpretation was in conflict with our decision in *A. B. Kirschbaum Co. v. Walling*, 316 U. S. 517.

The case was tried on an agreed statement of facts which in brief summary showed:

The respondent operated a plant in Mississippi in which veneer was manufactured from logs. A substantial portion of the manufactured product was destined for shipment in interstate commerce. Walton worked at the plant as a night watchman. His work week exceeded the maximum hours prescribed by the Fair

[1] 52 Stat. 1060; U. S. C. Title 29, § 216 (b).

[2] 11 So. 2d 912.

[3] Section 3 (j) of the Act provides that "An employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, . . . such goods, or in any process or occupation necessary to the production thereof." 52 Stat. 1060; U. S. C. Title 29, § 203 (j).

Labor Standards Act during the period in question. His duties were to make hourly rounds of the plant, punch the nightwatchman's clocks at various stations on the plant, and report any fires and trespassers. The fire insurance company which insured the plant's buildings, machinery, and fixtures required respondent to have a night watchman as a condition to granting reduced premium rates. Respondent's desire to obtain these reduced rates was the primary reason why Walton was employed. The plant was not operated at night while Walton was on duty and he did not physically assist in the manufacture or shipment of veneer.

In holding that these facts fell short of proving that Walton's work was "necessary to the production" of respondent's goods, the Mississippi Supreme Court particularly emphasized that Walton had no other duties to perform in addition to his regular duties as a night watchman; that he engaged in no manual activities connected with production; that he was not specially employed to protect goods assembled for manufacture or awaiting shipment in interstate commerce; and that no goods were manufactured during the hours he was on guard. Under our decision in the *Kirschbaum* case, *supra*, no one of these facts standing alone, nor all of them together, can support the Court's conclusion that the nature of Walton's employment left him without the Act's protection. His duty was to aid in protecting the building, machinery, and equipment from injury or destruction by fire or trespass. The very fact that a fire insurance company was willing to reduce its premiums upon condition that a night watchman be kept on guard is evidence that a watchman would make a valuable contribution to the continuous production of respondent's goods. "The maintenance of a safe, habitable building is indispensable to that activity." *A. B. Kirschbaum Co.* v. *Walling*, *supra*, 524. The relationship of Walton's employment to production was therefore not "tenuous" but had that "close and immediate tie with the process of production for commerce" which brought him within the coverage of the Act. *Ibid.*, 525.

The judgment is reversed and the cause is remanded to the Mississippi Supreme Court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice ROBERTS, considering himself bound by the decision in *Kirschbaum* v. *Walling*, 316 U. S. 517, concurs in the result.